IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

No. 81-

RICHARD TUCKER, JR.,

Petititioner,

v.

WALTER D. ZANT, Warden
Georgia Diagnostic and
Classification Center,

Respondent

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF BUTTS COUNTY, GEORGIA

Application No. 1992

SUPREME COURT OF GEORGIA

ATLANTA, March 24, 1982

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed:

Richard Tucker, Jr. v. Walter D. Zant, Warden

Upon consideration of the application for a certificate of probable cause to appeal filed in this case, it is ordered that it be hereby denied.

SUPREME COURT OF THE STATE OF GEORGIA,

CLERK'S OFFICE, ATLANTA,

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

Joline B. Williams Clerk.

APPENDIX A

IN THE SUPERIOR COURT OF BUTTS COUNTY

STATE OF GEORGIA

RICHARD TUCKER, JR.,	:	
	:	
PETITIONER	:	
	:	
VS.	:	HABEAS CORPUS
	:	FILE NO. 5019
WALTER ZANT, WARDEN, GEORGIA DIAGNOSTIC AND CLASSIFICATION CENTER,	:	
	:	
RESPONDENT	:	

ORDER

This Habeas Corpus challenges the constitutionality of Petitioner's restraint and the imposition of the death penalty by the Superior Court of Bibb County. Petitioner was convicted of Murder and Kidnapping with Bodily Harm. He received two death sentences. His convictions and sentences were affirmed by the Supreme Court. Tucker v. State, 245 Ga. 68 (1980). Certiorari was denied by the Supreme Court of the United States.

The Petition, as amended, contains 42 numbered paragraphs, of which 31 allege substantive claims for relief (10-28; 31-42). Evidence and argument have been presented on only one point, however, and the Court will only address this claim for relief. All unsupported allegations will be deemed abandoned and without merit.

The record in this habeas case consists of the transcript of the proceedings before this Court on

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May 29, 1981, and the transcript and record of Petitioner's trial in the Bibb County Superior Court.

I.

Petitioner claims he was denied his right under the Sixth and Fourteenth Amendments to the effective assistance of counsel.

FINDINGS OF FACT

Petitioner was represented at trial and on appeal by Robert Sikes, presently Assistant Solicitor in Bibb County. (H.T. 27). Mr. Sikes was admitted to the Bar in 1973. Id. At the time he was appointed to represent Petitioner at trial, he was engaged in private practice. Id. Though he had previously handled felony cases, this was his first capital case. (H.T. 40).

At Mr. Sikes' request, Robider Markwalter was appointed to assist Mr. Sikes. (H.T. 44). Mr. Markwalter has been in private practice for 11 years. Id. He estimated that during the first six years of his practice, 30% was in the criminal field. Id. He was experienced in capital and major felony cases. (H.T. 45).

Counsel filed numerous motions. (R. 6-25; 31-33). Both attorneys talked with Petitioner prior to trial, Mr. Sikes on at least a weekly basis, then more frequently prior to the trial of the case. (H.T. 18, 32, 45). They discussed defenses and pretrial motions with

Petitioner. (H.T. 18). Mr. Sikes met with the District Attorney and at one point discussed the possibility of a plea bargain, but the prosecutor refused. (H.T. 28, 37). Counsel had access to and reviewed the District Attorney's file and were given the State's witness list. (H.T. 28, 31, 46). They asked Petitioner for witnesses for the guilt/innocence phase of trial, but the names he gave them all appeared on the State's witness list. (H.T. 29). They interviewed the police officers, the F.B.I. agent about the fingerprint evidence, the Civil Defense Director who had found the body and pieces of evidence, and Mr. Henry who implicated Petitioner. (H.T. 31, 53). They also examined the tremendous amount of physical evidence, including the photographs introduced at trial. (H.T. 30).

Regarding defenses, Counsel tried to build a psychiatric defense, but this was quashed by the results of the psychiatric examination of Petitioner at Central State Hospital and the second evaluation by a local psychologist in Macon. (H.T. 35-36). No alibi defense was available. (H.T. 36). Petitioner had confessed; when the motion to suppress the confession was overruled, Mr. Sikes stated that "the question of a viable defense went out the window." Id.

Their strategy in the sentencing phase was to put Petitioner on the stand to evoke as much sympathy as possible. (H.T. 35). As for other witnesses in

mitigation, Petitioner virtually had no family nor community ties which could have yielded witnesses. (H.T. 9, 37, 49). Counsel did talk with Petitioner's cousin, Rosa Mae Lewis, but they decided she would not be beneficial. (H.T. 11, 37, 49).

Counsel, after looking into the matter, did not think challenging the jury was a necessary tactic. (H.T. 34). Petitioner participated in the jury-selection process. (H.T. 53). Blacks did serve on the jury. (H.T. 34, 52).

At trial, Counsel reserved his right to make an opening statement till the close of the State's case (T.T. 211); cross-examined State's witnesses (T.T. 232; 244; 257; 266; 277; 291; 332; 337; 350; 365; 371; 384; 393; 401; 416; 430; 442; 453; 456; 462; 467; 471; 474; 497; 528; 548; 560; 565; 571; 580; 620; 630; 636; 640; 651; 658; 698); gave argument during guilt/innocence phase of the trial (T.T. 724-734; 750-761); gave argument during the sentencing phase (903-915) and presented Petitioner in his own behalf. (T.T. 800).

CONCLUSIONS OF LAW

The Sixth Amendment right to counsel means "...not errorless counsel, and not counsel judged ineffective by hindsight, but counsel reasonably likely to render and rendering reasonably effectice assistance." MacKenna v. Ellis, 280 F.2d 592 (5th Cir. 1960); Pitts v. Glass, 231 Ga. 638 (1974).

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Petitioner's Counsel easily meets this test. Both attorneys were experienced in the trial of criminal cases. They prepared for and advocated Petitioner's cause in a reasonably effective manner considering the difficulty of the case and the lack of material to work with. While it may be true that Counsel put up a relatively scant defense, the finest lawyer in the country could not put up a defense that did not exist. Both attorneys appeared to be intelligent and concerned defense lawyers. The effort they put forth was certainly reasonably effective within the meaning of the standard.

That Counsel did not object to the prosecutor's mention of "parole" does not render either attorney ineffective in a constitutional sense. The Supreme Court addressed the issue of the prosecutor's remark on direct appeal. Tucker v. State, 245 Ga. at 72. Defense Counsel had introduced evidence of Petitioner's parole. Id. The Court noted that, though Counsel failed to object at the time the remark was made, Counsel "used to his advantage the fact of the prior parole by arguing to the jury that appellant would serve a full life sentence because the Board of Pardons and Paroles would not grant parole a second time." Id. Because of Counsel's curative remarks, it was not error for the trial court not to grant a mistrial on its own motion. Id. With no harmful error having been shown, the Court cannot conclude Counsel was ineffective in failing to object.

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Neither was Counsel ineffective in not filing a jury challenge. Petitioner has not shown that there was anything wrong with the grand or traverse jury pools. Ergo, the Court concludes that Petitioner has not demonstrated that Counsel's decision not to file a challenge was clearly erroneous or that he was ineffective as a result of such decision. Birt v. Hopper, 245 Ga. 221, 224 (1980).

This claim for relief is found to be without merit.

WHEREFORE, all allegations in the amended Petition having been found either without merit or abandoned, the Petition, as amended, is denied.

This 11 day of Septmeber, 1981.

ALEX CRUMBLEY
JUDGE SUPERIOR COURTS
FLINT JUDICIAL CIRCUIT

APPENDIX B

IN THE SUPERIOR COURT OF BUTTS COUNTY

STATE OF GEORGIA

RICHARD TUCKER, JR.,	:	
	:	
PETITIONER	:	
	:	
VS.	:	
	:	HABEAS CORPUS
WALTER D. ZANT,	:	FILE NO. 5363
WARDEN, GEORGIA	:	
DIAGNOSTIC AND	:	
CLASSIFICATION CENTER,	:	
	:	
RESPONDENT	:	

ORDER

The Court allowed the filing of this second Habeas Corpus Petition to examine a question which was not included in Petitioner's first Petition in this Court.

The issue presented is as follows:

> Whether the admission into evidence of nonstatutory aggravating circumstances at the sentencing phase violated Petitioner's Sixth, Eighth, and Fourteenth Amendment rights under the recent decision of Henry v. Wainwright, 661 F.2d 56 (Former 5th Cir., November 12, 1981).

In Henry v. Wainwright, supra, the Court found that under Florida's death penalty statute, the admission

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FILED Feb. 1 1982 at 8:00 A M
Audrey A Kelly CHIEF DEP. CLERK

of nonstatutory aggravating factors and jury instructions permitting consideration of any aggravating circumstances was constitutional error and required that Henry's death sentence be set aside.

Petitioner claims that under the rule announced in Henry, the admission into evidence of his prior convictions during the sentencing phase violated his constitutional rights.

Henry is readily distinguished from the case at hand. In Henry, the Florida Supreme Court acknowledged that "the introduction and consideration of nonstatutory aggravating factors is, under its statute, error." Henry v. Wainwright, supra, at 59.

In contrast, Georgia's death penalty statute provides for consideration at the sentencing phase of "any mitigating or aggravating circumstances otherwise authorized by law and any of the following statutory aggravating circumstances which may be supported by the evidence...." Ga. Code Ann. §27-2534.1(b). This includes prior convictions and pleas of guilty, subject to notice by the State to the Defendant prior to trial. Ga. Code Ann. §27-2503; Fair v. State, 245 Ga. 868, 873-874 (1980).

The record here indicates that prior to trial Petitioner was given notice of the State's intent to introduce his prior convictions into evidence, as

well as its intent to prove four statutory aggravating circumstances. (R. 37-40).

The Court finds this claim for relief to be without merit.

Accordingly, the Petition is denied.

SO ORDERED, this 29 day of January, 1982.

ALEX CRUMBLEY
JUDGE SUPERIOR COURTS
FLINT JUDICIAL CIRCUIT

APPENDIX C

APPENDIX D

STATUTES INVOLVED

Georgia Code Annotated Section 24-4526

Appeals of Habeas Corpus After Criminal Connvictions

When Applications Granted An application to apeal a final judgement in a habeas corpus case after a criminal conviction will be granted where there is arguable merit.

Georgia Code Annotated Section 26-1101

Murder (a) A person commits murder when he unlawfully and with malice aforethought, either express or implied, causes the death of another human being. Express malice is that deliberate intention unlawfully to take away the life of a fellow creature, which is manefested by external circumstances capable of proof. Malice shall be implied where no considerable provocation appears, and where all the circumstances of the killing show an abandoned and malignant heart.

(b) A person also commits the crime of murder when in the commission of a felony he causes the death of another human being, irrespective of malice.

(c) A person convicted of murder shall be punished by death or by imprisonment for life.

Georgia Code Annotated Section 26-1311

Kidnapping (a) A person commits kidnapping when he abducts or steals away any person without lawful authority or warrent and holds such person against his will.

(b) A person over the age of 17 commits kidnapping when he forcibly, maliciously, or fraudulently leads, takes, carries away, or decoys or entices away any child under the age of 16 years against the will of the child's parents or other person having lawful custody.

A person convicted of kidnapping shall be punished by imprisonment for not less than one year or more than 20 years: Provided that a person convicted of kidnapping for ransom shall be punished by life imprisonment or by death; and Privided that if the person kidnapped shall have received bodily injury, the person convicted shall be punished by life imprisonment or by death.

Georgia Code Annotated Section 26-3102

Capital offenses; jury verdict and sentence. Where, upon a trial by jury, a person is convicted of an offense which may be punishable by death, a sentence of death shall not be imposed unless the jury verdict includesa finding of at least one statutory aggravating circumstance and a recommendation that such sentence be imposed. Where a statutory aggravating circumstance is found and a recommendation of death is made, the court shall sentence the defendant to death. Where a sentence of death is not recommended by the jury, the court shall sentence the defendant to imprisonment as provided by law. Unless the jury trying the case makes a finding of at least one statutory aggravating circumstance and recommends the death sentence in its verdict, the court shall not sentence the defendant to death, provided that no such finding of aggravating circumstance shall be necessary in offenses of treason or aircraft hijacking. The provisions of this section shall not affect a sentence when the case is tried without a jury or when the judge accepts a plea of guilty.

Georgia Code Annotated Section 27-2534.1

Mitigating and aggravating circumstances; death penalty.

(a) The death penalty may be imposed for the offenses of aircraft hijacking or treason, in any case.

(b) In all cases of other offenses for which the death penalty may be authorized, the judge shall include in his instructions to the jury for it to consider, any mitigating circumstances or aggravating circumstances otherwise authorized by law and any of the followingstatutory aggravating circumstances which may be supported by the evidence:

(1) The offense of murder, rape, armed robbery, or kidnapping was committed by a person with a prior record of conviction for a capital felony, or the offense of murder was committed by a person who has a

substantial history of serious assaultive criminal convictions.

(2) The offense of murder, rape, armed robbery, or kidnapping was committed while the offender was engaged in the commission of another capital felony, or aggravated battery, or the offense of murder was committed while offender was engaged in the commisssion of burglary or arson in the first degree.

(3) The offender by his act of murder, armed robbery, or kidnapping knowingly created a great risk to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person.

(4) The offender committed the offense of murder for himself or another, for the purpose of receiving money or any other thing of monetary value.

(5) The murder of a judicial officer, former judicial officer, district attorney or solicitor during or because of the excercise of his official duty.

(6) The offender caused or directed another to commit murder or committed murder as an agent or employee of another person.

(7) The offense of murder, rape, armed robbery, or kidnapping was outrageously or wantonly vile, horrible, or inhuman in that involved torture, depravity of mind, or an aggravated battery to the victim.

(8) The offense of murder was committed by a person in, or who has escaped from, the lawful custody of a peace officer or place of lawful confinement.

(9) The offense of murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or custody in a place of lawful confinement, of himself or another.

(c) The statutory instructions as determinedby the trial judge to be warrented by the evidence shall be given in charge and in writing to the jury for its deliberation. The jury, if its verdict be a recommendation of death, shall designate in writing, signed by the foreman of the jury, the aggravating

circumstance or circumstances which it found beyond a reasonable doubt. In non-jury cases the judge shall make such designation. Except in cases of treason or aircraft hijacking, unless at least one of the statutory aggravating circumstances enumerated in Code Section 27-2534.1 (b) is so found, the death penalty shall not be imposed.

Georgia Code Annotated Section 50-127

Exclusive procedure for suing out a writ of habeas corpus for persons whose liberty is being restrained by virtue of a sentence imposed against them by a State court of record.

Notwithstanding the other provisions of this Title, the following is the exclusive procedure for suing out a writ of habeas corpus for persons whose liberty is being restrained by virtue of a sentence imposed against them by a State court of record:

(1) Grounds for writ.

Any person imprisoned by virtue of a sentence imposed by a State court of record who asserts that in the proceedings which resulted in his conviction there was a substantial denial of his rights under the Constitution of the United States or of the State of Georgia or the laws of the State of Georgia may institute a proceeding under this section. Except for objections relating to the composition of a grand or traverse jury, rights conferred or secured by the Consitution of the United States shall not be deemed to have been waived unless it is shown that there was an intentional relinquishment or abandonment of a known right or privilege which relinquishment or abandonment was participated in by the party and was done voluntarily, knowingly, and intelligently. The right to object to the composition of the grand or traverse jury will be deemed waived under this section, unless the person challenging the sentence shows in the petition and satisfies the court that cause exists for his being allowed to pursue the objection after the conviction and sentence has otherwise become final.

(2) Petition and verification.

The petition shall identify the proceeding in which the petitioner was convicted, give the date of rendition of the final judgement complained of, and clearly set forth the respects in which petitioner's rights were violated. The petition shall have attached thereto affidavits, records, or other evidence supporting its allegations or shall state why the same are not attatched. The petition shall idnetify any previous proceedings that petitioner may have taken to

secure relief from conviction. Argument and citations of authorities shall be omitted from the petition. The petition must be verified by the oath of the applicant or some other person in his behalf.

(3) Jurisdiction and venue.
The petition must be filed in the superior court of the county wherein the petitioner is being detained. The superior courts of such counties have exclusive jurisdiction of habeas corpus actions arising under this section.

(4) Service of the petition.
Service of the petition shall be made upon the person having custody of the petitioner. If the petitioner is being detained under the custody of the Board of Corrections, an additional copy of the petition shall be served on the Attorney General; however, if the petitioner is being detained under the custody of some other authority other than the Board of Corrections, an additional copy of the petition shall be served upon the solicitor general of the county wherein the petition is filed. Service upon the Attorney General or the solicitor general may be had by mailing a copy of the petition along with a proper certificate of service.

(5) Custody of petitioner.
Custody and control of petitioner shall be retained by the Board of Corrections or other authority having custody of the petitioner and it shall be the duty of such board or authority to produce the petitioner at such times and places as the court may direct.

(6) Proceedings on petition.
Within 20 days after filing and docketing of the petition, or within such further time as the court may set, the respondent shall answer or move to dismiss the petition. The court shall set the case for a hearing on the issues within a reasonable time after the filing of defensive pleadings.

(7) Disposition in the trial court.
(a) The court may receive proof by depositions, oral testimony, sworn affidavits, or other evidence.
(b) The taking of depositions upon written questions, by either party, shall be governed by the provisions of sections 81A-127 through 81A-132 amd 81-137: Provided, however, that the time allowed in section 81A-131 for service of cross-questions upon all other parties shall be 10 days from the date the notice and written questions are served.

(c) If sworn affidavits are intended by either party to be introduced into evidence, the party intending to introduce the affidavit shall cause it to be served upon the opposing party at least five days in advance of the date set for a hearing in the case. The affidavit so served shall be accompanied by a notice of the party's intention to introduce it into evidence. The superior court judge considering the petition for writ of habeas corpus may resolve the disputed issues of fact upon the basis of sworn affidavits standing by themselves.

(d) If the court finds in favor of the petitioner, it shall enter an appropriate order with respect to the judgement or sentencechallenged in the proceeding and such supplementary orders as to rearraignment, retrial, custody, or discharge as may be necessary and proper. In all cases the court shall dispose of the matter as law and justice require.

(8) Transcribing proceedings.

All trials held under this section shall be transcribed by a court reporter designated by the superior court hearing the case.

(9) Judge's findings of fact and conclusions of law.

After reviewing the pleadings and evidence offered at the trial of the case, the judge of the superior court hearing the case shall make written findings of fact and conclusions of law upon which the judgement is based. Such findings of fact and conclusions of law shall be recorded as part of the record of the case.

(10) Subsequent petitions - waiver of grounds not claimed.

All grounds of relief claimed by a petitionerfor a writ of habeas corpus shall be raised by a petitioner in his original or amended petition. Any grounds not so raised are waived unless the Constitution of the United States or of the State of Georgia otherwise requires, or any judge to whom the petition is assigned, on considering the subsequent petition, finds grounds for relief asserted therein which could not reasonably have been raised in the original or amended petition.

(11) Practice as to appeals.

(a) Appeals in habeas corpus cases shall be governed by the Appeallate Procedure Act of 1965 [§6-701 et seq], except that as to finalorders of the court which are adverse to the petitioner, no appeal shall be allowed unless a justice of the Supreme Court of Georgia shall issue of certificate of probable cause for such appeal.

(b) Within 30 days from the entry of the order denying relief to the petitioner, a written application for a certificate of probable cause to appeal must be filed with the clerk of the Supreme Court of Georgia, if the unsuccessful petitioner desires to appeal. The petitioner shall also file, within the same period, a notice of appeal with the clerk of the concerned superior court. A justice of said appellate court shall either grant of deny the application within a reasonable time after filing. So the justice may fully consider the request for a certificate, the clerk of the concerned superior court shall forward as in any other case, the record and transcript if designated, to the clerk of the Supreme Court of Georgia when notice of appeal is filed. The clerk of the concerned superior court need not prepare and retain and the court reporter need not file, a copy of the original record and a copy of the original transcript of the proceedings. The clerk of the Supreme Court of Georgia shall return the original record and transcript to the clerk of the concerned superior court upon completion of the appeal if the certificate is granted. If the justice of the Supreme Court of Georgia denies the application for certificate of probable cause, the clerk of the Supreme Court of Georgia shall return the original record and transcript and notify the clerk of the concerned superior court and the parties to the proceedings below of the determination that probable cause does not exist for appeal.

(c) If the trial court finds in favor of the petitioner, no certificate of probable cause need be obtained by respondent as a condition precedent to appeal. A notice of appeal filed by the respondent shall act as a supersedeas and stay the judgement of the superior court until there is a final adjudication by the appellate court: Provided, however, that while such case is on appeal, the petitioner may be released on bail as is now provided for in criminal cases, except where petitioner has been convicted of a crime over which the Supreme Court of Georgia has jurisdiction to consider on direct appeal. The right to bail and the amount of bond shall be within the discretion of the judge of the superior court where the sentence successfully challenged under this chapter was originally imposed.